

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	FILED/ACCEPTED
Reclassification of License of Class A Television Stations)	APR 23 2012
)	Federal Communications Commission Office of the Secretary
KASC-CA Atascadero, California)	Facility ID No. 10537
)	
KDFS-CA Santa Maria, California)	Facility ID No. 31351
)	
KLDF-CA Lompoc, California)	Facility ID No. 41126
)	
KPAO-CA Paso Robles, California)	Facility ID No. 68663
)	
KSBO-CA San Luis Obispo, California)	Facility ID No. 31354
)	

To: Office of the Secretary
Attn: Barbara A. Kreisman, Chief, Video Division, Media Bureau

RESPONSE TO ORDER TO SHOW CAUSE

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April 23, 2012

SUMMARY

Una Vez Mas, LP (“UVM”), parent of the licensees of the above-referenced Class A television stations (the “Stations”), respectfully submits that the licenses for the Stations should not be modified as proposed by the Order to Show Cause (the “*Show Cause Order*”) issued on March 15, 2012. The *Show Cause Order* is premised entirely on the fact that the Stations were off the air for certain periods between 2006 and January 2012. As a result, the *Show Cause Order* states, it was incumbent upon the licensees to notify the Commission that the Stations were unable to fulfill their obligations under Section 73.6001 of the Commission’s rules, and that the licenses should now be modified to specify low power television rather than Class A status.

The proposed modification, which is tantamount to license revocation given the current broadcast television climate, cannot stand as a matter of law or as a matter of policy. In the Community Broadcasters Protection Act (“CPBA”), Congress expressly recognized the value of certain low power television stations in providing programming to unserved and underserved local communities. Acutely aware of their vulnerability in light of the upcoming digital television transition, Congress offered a safe haven for qualifying LPTV stations—protected Class A status. The CPBA made clear that Class A status was to be *permanent*, provided Class A licensees abided by rules governing full power television stations.

Since it acquired the Stations in 2006, UVM has and continues to abide by rules governing full power television stations. Given the unique characteristics of the Santa Barbara-Santa Maria-San Luis Obispo market, the company made a \$2.5 million investment and set out to create a local network primarily comprised of the Stations, one that would bring communities within the DMA Spanish-language local and network programming and provide a viable advertising vehicle from which to generate sufficient revenue to continue operations. Initially, this required taking the Stations off the air to repair equipment and to build new microwave facilities. Later, the Santa Barbara hub facility burned to the ground during the so-called “Tea Fires,” forcing the company to

again take the Stations dark. As UVM attempted to right itself after the utter destruction caused by the wildfires, it faced new impediments—no clear path for an LPTV digital transition, a ravaged economy, and an operating environment in which LPTV stations suffered unprecedented viewership and advertising losses. Available capital dried up completely. UVM therefore availed itself of what it, and other similarly situated Class A television operators, based on longstanding Commission precedent, believed to be a mechanism through which to conserve resources, preserve its licenses, and position the Stations for return to air.

The Stations never ceased operations for more than the clear, 12-month statutory period established by Congress. Moreover, the Stations never ceased operations without seeking appropriate special temporary authority (“STA”) from the Commission. At the same time, the Commission never provided UVM with any indication whatsoever that it risked losing Class A status for any of the Stations. Now, reversing precedent and in contrast to its STA approvals, the Commission appears to be of the view that Class A stations must operate for 18 hours every day and provide requisite programming regardless of their circumstances or their status will be revoked. As a matter of law, this position impermissibly singles out Class A television stations for disparate treatment and conflicts with the clear language and intent of the CBPA.

History is now repeating itself and the continued existence of LPTVs is questionable, with spectrum auctions and repacking on the horizon. In this environment, investment in stations other than Class A stations has become increasingly unlikely. The Commission’s proposed modification, therefore, is a draconian penalty for non-compliance with a policy that is suspect and ambiguous at best.

With Congress’ promise of continued Class A protection, a set date for the digital transition, and a slowly improving economy, UVM returned the Stations to the air permanently in January 2012, and they are providing alternative Spanish-language programming, including news and public affairs programming, to a burgeoning Hispanic population with limited viewing choices. As a matter of policy, dooming these Class A

stations to uncertain LPTV status and jeopardizing their continued ability to serve the Hispanic population in these markets would contravene the purpose of both the CBPA and the Commission's own diversity and localism objectives.

The Commission's proposed action singles out Class A stations for unfair, unjust, and disparate treatment, frustrates Congress' intent in issuing permanent Class A licenses, and likely will deprive Hispanic viewers in the relevant market of a valuable programming option going forward. For these reasons, the Commission should not modify the licenses for the Stations to low power television status.

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To: Office of the Secretary
Attn: Barbara A. Kreisman, Chief, Video Division, Media Bureau

RESPONSE TO ORDER TO SHOW CAUSE

Una Vez Mas, LP, managing member of Una Vez Mas Atascadero License, LLC, licensee of KASC-CA, Atascadero, California (Facility ID No. 10537), Una Vez Mas Santa Maria License, LLC, licensee of KDFS-CA, Santa Maria, California (Facility ID No. 31351), Una Vez Mas Lompoc License, LLC, licensee of KLDF-CA, Lompoc, California (Facility ID No. 41126), Una Vez Mas Paso Robles License, LLC, licensee of KPAO-CA, Paso Robles, California (Facility ID No. 68663), and Una Vez Mas San Luis Obispo License, LLC, licensee of KSBO-CA, San Luis Obispo, California (Facility ID No. 31354) (the "UVM Licensees" and, collectively, "Una Vez Mas"), by its attorneys,

hereby responds to the *Order to Show Cause* issued by the Chief, Video Division, Media Bureau on March 15, 2012¹ with respect to the above-referenced stations (the “Stations”).

I. INTRODUCTION AND SUMMARY

The Commission proposes to terminate the Stations’ Class A status for their alleged failure to comply with the Commission’s programming and operating requirements for Class A stations. The alleged non-compliance, the record demonstrates, occurred during periods when the Stations were operating under special temporary authority (“STA”) to remain silent or had submitted timely notices of silent status with requests for STA. As will be demonstrated herein, the *Show Cause Order* wrongly supposes that the minimum operating requirements for Class A stations exceed those applicable to full-power stations. Moreover, the *Show Cause Order* suggests that Class A stations must miraculously fulfill certain programming obligations *even when they are off the air*.

Una Vez Mas does not dispute that a series of circumstances beyond its control (including the devastating California wildfires of 2008) prevented the Stations from broadcasting during several discrete periods over the past five years. Una Vez Mas duly reported every outage to the Commission in its applications for special temporary authority, which for several years were granted, until the agency mysteriously and without notice changed its procedures.² Una Vez Mas believed in good faith and with

¹ DA 12-414 (the “*Show Cause Order*”).

² According to CDBS, the FCC has not acted affirmatively to grant silent authority to a Class A television station since mid-December 2009. (A search of CDBS April 23, 2012 using “Class A Television” and “Silent STA” as values for “Form Number” and “Service,” respectively, yielded 438 results showing that the last Silent STA authorization was granted on December 14, 2009. Since that date, all requests for Silent STA remain “accepted for filing” or have been dismissed.) It is generally assumed when Media Bureau staff receives but does not act upon licensee requests that those requests have been granted. Requests are routinely received by the staff, for example, seeking extensions of time to file post-

sound reason that it was following a process permitted by the Commission's rules (and, in fact, specifically prescribed in public notices addressing the precise circumstances in which the Stations found themselves). In no instance did the Stations cease operations for more than the clear, 12-month statutory period established by Congress when it dictated the circumstances under which a broadcast licensee's failure to operate would automatically result in the loss of its license. Moreover, in no instance did the Stations cease operations without seeking appropriate authority from the Commission. Yet, the unprecedented and draconian action proposed by the Commission would terminate the Stations' status as interference-protected, displacement-immune television facilities and would reduce them to secondary status low-power television ("LPTV") stations, subject to displacement by full-power and Class A television stations, with no safeguard from interference, and no assurance of future frequency availability or, indeed, continued existence. In other words, the Commission's proposed sanction is tantamount to license revocation and is entirely inappropriate under the circumstances. For the reasons described below, Una Vez Mas respectfully requests that the Commission preserve Class A status for each of the Stations.

II. BACKGROUND

A committed broadcaster, Una Vez Mas is the largest U.S. affiliate group of the Azteca America television network. Through its nearly decade-long network/affiliate relationship with Azteca America, Una Vez Mas has brought alternative Spanish-language programming to underserved audiences throughout the United States. Una Vez

consummation ownership reports. No action is taken on these requests, which are in effect, granted by default. In the case of requests for silent authority, the Commission takes the action of changing the status of the requesting station in CDBS from "Licensed" to "Licensed and Silent," so that no station could be presumed to be on the air that has filed such a request.

Mas initially focused exclusively on operating low-power and Class A stations, with the goal of bringing a viable Spanish-language competitor to diverse markets, large and small.

Since the inception of low-power television in 1982, LPTV licensees like Una Vez Mas have played an invaluable role by operating in unserved and underserved areas, increasing the diversity of broadcast voices, and providing niche programming to a wide variety of racial and ethnic minorities. By 1999, byproducts of the looming DTV transition threatened to displace LPTV stations—first from digital companion channels issued to full-power stations and then from the consolidation of spectrum available for broadcast television from 59 channels to 51. This uncertain future created a substantial hardship for many LPTV stations, which, given their vulnerability to channel displacement and the potential unavailability of alternative frequencies, struggled to obtain the funding necessary to develop viable, long-term business plans. Congress, recognizing the plight of these stations, sought to resolve the uncertainty surrounding their operation by creating a “Class A” television service.

Of course, the history of Class A television stations has been a series of actions and reactions to threats of spectrum scarcity. The service was created by Congress in 1999 to provide certain qualifying LPTV stations a permanent, secure home—in other words, a safe haven—in the face of the spectrum crunch triggered by the full-power digital television transition. Through the Community Broadcasters Protection Act of 1999 (the “CBPA”), Congress offered a process through which certain LPTV stations could obtain a “permanent” Class A license, which would provide all of the relevant benefits and responsibilities of a full-power television license to stations despite the

technical limitations inherent in LPTV operations, based on the finding that such stations played a critical role in bringing programming to underserved audiences.

Because of concerns about the number of potential Class A stations, the CBPA prescribed specific criteria for the Commission to apply in determining whether an LPTV station was eligible for Class A status. Namely, for the 90 days prior to the CBPA's adoption, LPTV stations were required to demonstrate that they broadcast for a minimum of 18 hours per day and provided at least 3 hours of programming each week produced within the market area served by the station. In addition, from the time that an LPTV station applied for Class A status, it was required to comply with all applicable Commission rules for full-power television stations.

Unfortunately, the new world that greeted the permanent Class A station was not without its own impediments. Although Class A stations were no longer secondary to full-power stations, they still faced questions about their digital transitions. For instance, an early proposal would have required all LPTV stations, including Class A stations, to relinquish analog service and flash cut to digital at a time when many viewers (including minority populations and viewers in rural areas) still relied heavily on over-the-air signals and could only receive analog broadcasts. When manufacturers of digital-to-analog converter boxes were not required to pass through analog signals, LPTV stations were thrown into limbo, potentially unable to reach viewers and sustain ratings. Uncertainty about the timing of the low-power digital transition persisted *until just last year*, when the FCC announced a September 2015 date for the completion of the digital transition for LPTV stations, including Class A stations.

Combined with the ambiguity surrounding the low-power digital transition, Class A stations have suffered acutely the ravages of the worst economic downturn since the great depression.³ The capital market for broadcast stations became virtually non-existent, and revenues tanked.⁴ Class A and LPTV stations, with their more limited reach, bore the brunt disproportionately, as advertising dollars became especially sparse, with most buys benefiting larger, more established stations. Moreover, unlike their full-power counterparts, Class A stations were not entitled to must-carry status, limiting their carriage on cable and satellite systems and the commensurate ability to generate advertising revenue. At the same time, the Commission issued its National Broadband Plan, and along with it came the specter that any investment made in Class A or LPTV stations would be lost completely to television spectrum reclamation.⁵

In recent years, this perfect storm of income-limiting, capital-limiting, carriage-limiting realities has tested the survival skills of all LPTV licensees, including Class A stations. It is not an exaggeration to state that most LPTV broadcasters have struggled to pay basic operating expenses during this period, much less maintain reserve accounts for any unanticipated technical expenses the stations may have incurred. With the uncertain timing of the digital transition and the risk of losing spectrum always looming in

³ See, e.g., Suzy Khimm, *The Great Recession in Five Charts*, Washingtonpost.com WonkBlog, Sept. 13, 2011, available at http://www.washingtonpost.com/blogs/ezra-klein/post/the-great-recession-in-five-charts/2011/09/13/gIQANuPoPK_blog.html (“Real median income had a record drop between 2009 and 2010, marking an even more rapid decline than in previous recessions. Income had been edging downward since the end of the Clinton administration, but the recent recession essentially wiped out more than a decade’s worth of gains.”).

⁴ Two years after the collapse of the market in 2008, financing for broadcasting still remained illusory. “Financing For Broadcast Deals Said Still Hard to Come By,” *Communications Daily*, p. 5, April 8, 2010.

⁵ Omnibus Broadband Initiative, FCC, *Connecting America: The National Broadband Plan*, at ch. 5 (2010) (“National Broadband Plan”).

background, decisions to repair and/or replace analog infrastructure when it failed posed Solomon-like questions for these licensees. Ironically, for LPTV stations, history is today repeating itself; LPTV stations find themselves in the same predicament as they did more than a decade ago, when Congress stepped in to preserve qualifying stations because of their unique role in bringing valuable programming to underserved communities. For Class A stations, there is only now the promise of continued protection.⁶

It is in this context that the actions of Una Vez Mas with respect to the Stations must be considered. Not unlike similarly-situated Class A and LPTV operators, when the economy hit bottom, the company struggled to find the financial resources necessary for operating expenses and investment in equipment in markets generating little to no revenue. The *Show Cause Order* superficially characterizes Una Vez Mas' actions to take the stations dark as "a business decision." But the complete picture is far more complex. The devastating impact of the wildfires was far-reaching, revenues for Class A and LPTV stations in these markets dried up, early conversion to digital made no sense from a viewer perspective (and the resources simply were not there, regardless), and acquiring money for equipment expenditures that might prove obsolete was simply impossible. Moreover, Una Vez Mas was presented with no opportunity to sell any of the Stations at any reasonable price. Access to capital was extremely limited, and when

⁶ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, at § 6001(6) (2012) ("The term 'broadcast television licensee' means the licensee of—(A) a full-power television station; or (B) a low-power television station that has been accorded primary status as a Class A television licensee . . ."). The legislation provides that Class A stations are eligible to participate in the incentive auction process and that their status will be preserved during eventual repacking of the television broadcast spectrum.

available, money was targeted only for investment in full-power broadcast television stations with must-carry rights and more expansive, digital signals.

The Stations are all located within the Santa Barbara-Santa Maria-San Luis Obispo Designated Market Area (“DMA”), and their fortunes are inextricably intertwined with those of Una Vez Mas’ Santa Barbara station. The Stations are nestled along California’s Central Coast, with Los Angeles to the south and San Francisco to the north. Geographically, the relatively small communities of Santa Maria, Lompoc, Paso Robles, and San Luis Obispo are isolated by the Pacific Ocean to the west and the Santa Ynez Mountains to the east. They are joined by similar economies based upon farming, ranching, oil production and tourism. Because of the sheer size of the DMA and the distance between population centers, as well as the topography of the area, the only way the market can be viably served by LPTVs is through the use of multiple stations, a “local network” if you will. In order to attract major advertisers, it was essential for Una Vez Mas to have the ability to sell the DMA as a whole. In 2006, Una Vez Mas strategically acquired the Stations, as well as KZDF-LP, investing more than \$2.5 million to get this Santa Barbara cluster up and running. Network programming was picked up through a receive station in Santa Barbara, which was then fed through a system of microwave facilities to the smaller communities. Certain of the Stations were taken off the air for certain periods post-closing as existing equipment was restored and the microwave system was built, which took almost a year.

Then came a devastating economic downturn no one could predict. The hostile operating environment for the Stations was viciously compounded by the infamous Santa Barbara “Tea Fires” in November 2008, which burned the Santa Barbara hub facility to

the ground. As a result, Una Vez Mas was forced to apply for temporary special authority to go silent while it rebuilt its base of operations so that it could continue providing service on the Stations. Aside from the considerable technical setbacks the utter destruction caused by the fire created, market conditions continued to deteriorate. It is well-documented that even established Spanish-language broadcasters Entravision and Univision, who operate full-power stations, faced considerable financial woes in the beleaguered Santa Barbara-Santa Maria-San Luis Obispo market and were forced to make drastic cuts, including pulling the plug on local news.⁷

Given this untenable position, Una Vez Mas did all it could do to position the Stations to return to the air. As part of its strategic plan, Una Vez Mas refocused its efforts to acquiring distressed full-power television properties with more likelihood of near-term profitability (with financing limited to full-power television acquisitions only), and is now operating full-power stations in Houston, Dallas, and San Francisco. These new full-power Azteca America flagship affiliates have had little time to take root.

Nonetheless, with the promise of full-power anchor stations in major markets, a date certain for the low-power DTV transition, an uptick in the economy, promised protection for Class A television stations in spectrum repacking, and an increasing appetite for Spanish-language programming in the U.S., Una Vez Mas now has been able to reinvest in the Stations and to overcome those circumstances that in recent years have conspired to render the company able to do little more than preserve the Stations' licenses

⁷ See Lara Cooper, *Financial Woes Threaten to Take Central Coast's Only Spanish TV News Show Off the Air*, Noozhawk.com, Dec. 19, 2011, available at http://www.noozhawk.com/article/121911_noticias_univision_costa_central/; *No Chance to Save Spanish News Department at KPMR*, KCOY.com, Dec. 26, 2011, available at <http://www.kcoy.com/story/16395559/no-chance-to-save-spanish-broadcasting-station-kpmr>.

consistent with Commission policy and precedent. Although Una Vez Mas was able to temporarily restore service on each of the Stations, as duly detailed in its notices to the Commission, it did not restore service on a permanent basis until January of this year. But with the reintroduction of the Stations, Azteca America has become an attractive option for the many Hispanics in Atascadero, Santa Maria, Lompoc, Paso Robles, and San Luis Obispo, who have had limited viewing choices, and the Hispanic television marketplace in the DMA has become more diverse and competitive, consistent with the Commission's objectives. Moreover, the Stations are providing news and public affairs programming.

A scarce two months after they returned to air, *without warning*, the Commission pulled the rug out from under these Stations by issuing the *Show Cause Order*. As a result, with spectrum auctions and repacking on the horizon, the Stations face a new threat to their survival, one which will at a minimum thwart investment in their continued operation and eviscerate their value. At bottom, the *Show Cause Order* proposes to revoke station licenses from a broadcaster that in good faith believed it was *fully complying* with the Commission's rules and availing itself of an appropriate mechanism to weather the storm created by the economy, exacerbated by the wildfires, and prolonged by the considerable uncertainty created by the National Broadband Plan and the Commission's own policies with respect to the digital transition for low-power television.⁸ As will be demonstrated below, to convict Una Vez Mas of a hanging

⁸ Any claim by the Commission to the contrary notwithstanding, the reclassification penalty proposed in the *Show Cause Order* would effectively amount to a revocation of the Stations' licenses, subjecting them to possible permanent displacement in the forthcoming repacking of the broadcast spectrum and, at the very least, further uncertainty until that process is complete, as well as the familiar weakened position in the capital markets that the CPBA sought to address by commissioning the issuance of "permanent" licenses.

offense under these circumstances, just as the Stations are finally seeing the light at the end of the tunnel, violates due process, singles out Class A stations for unfair, unjust, and disparate treatment, frustrates Congress' intent in issuing permanent Class A licenses, and will deprive Hispanic viewers in the DMA of a valuable programming option.

III. THE COMMISSION LACKS A VALID BASIS UPON WHICH TO RECLASSIFY THE STATIONS.

The *Show Cause Order* identifies a singular basis for the proposed reclassification: that during the periods that the Stations were silent they did not comply with the Commission's programming requirements for Class A stations.⁹ This is an illogical premise in the extreme. The notion that a station can be subject to punitive action for failing to meet specific programming requirements while it is silent is preposterous. Nor has the Commission adhered to this principle in the past. To the contrary, during the 2004-2007 renewal cycle, rather than reclassifying Class A stations that had been silent during the prior license term, the Commission renewed the stations' licenses.¹⁰ Similarly, in the case of a full-power station that reported significant periods

⁹ *Show Cause Order* at ¶ 7.

¹⁰ Based on records reviewed in the Commission's CDBS database, numerous Class A stations received license renewals following extended periods of being silent under granted Silent STAs. For example, the Commission granted the license renewal application of Class A station WQQZ-CA, Ponce, Puerto Rico, (Fac. ID 32142) on April 12, 2005 despite the station's history of being silent for significant periods between September 2001 and March 2002 and between September 2003 through and including the date it filed its renewal application on September 30, 2004 (BRTTA-20040930ADQ). Station KGBS-CA, Austin TX (Fac. ID 38562) received grant of its renewal application in March 2007 after a year under Silent STA (BRTTA-20060403BJV). Class A station WKGK-LP, Kokomo, IN (Fac. ID 34895) had been under Silent STA virtually continuously since December 2004 and was silent when it filed its renewal application in March 2005 (BRTTA-20050328ALI). The application was granted in September 2008. Finally, Class A station WKOG-LP, Indianapolis, IN (Fac. ID 34894) was silent when it filed its renewal application in August 2005. The station operated virtually continuously under Silent STA beginning in September 2004 and for much of 2005 and 2006. Nonetheless, its renewal was granted in March 2007. Una Vez Mas has not reviewed the license files of these stations, but an online search does not disclose that any of these grants came with sanctions, admonishments, or any indication from the agency that continued adherence to the Commission's rules for notice and request for silent authority did not or would not in the future apply to Class A stations.

when it was silent and requested STAs pursuant to the rules, the Commission renewed the station's license without so much as an admonishment.¹¹ Thus, even if the current proposal to reclassify the Stations were comprehensible, it is incumbent on the agency to clarify the inconsistency with prior practice *before* enforcing such drastic measures.¹² Reclassifying the Stations as low-power television stations is inappropriate in light of their compliance with—and, as importantly, their reliance on the continued applicability of—the rules for full-power television stations, as dictated by the CPBA.

The Commission's STA rules unambiguously permit stations to request permission from the Commission to "go silent." Under Section 73.1635, the agency may grant an STA for a variance "from the terms of the station authorization or requirements of the FCC rules applicable to the particular class or station."¹³ The ability of a station to request an STA to go silent is restricted only by the statutory provision, as reflected in the

¹¹ Full-power television station WEDY, New Haven CT (Fac. ID 13595) received a grant of its renewal in June 2009 despite having been silent all or most of the period from July 31, 2005 through and including the date it filed its renewal application on November 29, 2006 (BRET-20061129AGJ). Neither penalty or admonishment accompanied the grant.

¹² See *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Order, 19 FCC Rcd. 4975, ¶ 15 (2004) ("But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding Given, however, that Commission and staff precedent prior to our decision today permitted the broadcast at issue, and that we take a new approach . . . , [the licensee] did not have the requisite notice to justify a penalty." (citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000))); *id.*, Statement of Chairman Michael K. Powell, 19 FCC Rcd. at 4988 ("In administering our authority, the Commission must afford parties fair warning and due process and not let our zeal trample these fundamental protections. Given that today's decision clearly departs from past precedent in important ways, I could not support a fine retroactively against the parties."); see also *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, ¶¶ 111,124, 136, 145 (2006) (declining to issue forfeiture orders against licensees for indecency violations because existing precedent would have permitted the broadcasts and penalties would amount to retroactive sanctions) ("*Omnibus Order*").

¹³ 47 C.F.R. § 73.1635(a).

rule, that the licensee must not “fail to transmit broadcast signals for any consecutive 12-month period.”¹⁴

The Commission frequently has encouraged stations to request a silent STA when it is required by the circumstances. In fact, a 2009 Media Bureau Public Notice instructed stations forced off the air by the California wildfires (such as the Stations) to notify the agency if they “discontinued operations as a result of fire damage” and to request authority to deviate from the Commission’s minimum operating rules, if necessary.¹⁵ Accordingly, to protect the Stations’ licenses during periods when they were not operating, Una Vez Mas complied in all respects with the Commission’s procedures for obtaining special temporary authority to remain silent, making certain not to exceed at any time the twelve month statutory limit on such silence. Unavoidably, while under STA, the Stations ceased programming.

As the Commission concedes in the *Show Cause Order*, the Stations timely notified the FCC and requested the appropriate authority to remain silent at all times

¹⁴ 47 C.F.R. § 73.1635(a)(4); 47 U.S.C. § 312(g). In the *Show Cause Order*, the Commission quotes a footnote from the *Order on Reconsideration* stating that an STA is only available “in appropriately compelling circumstances involving a temporary inability to comply.” *Show Cause Order* at ¶ 7 (quoting *Order on Reconsideration* at 8257, n.76). However, Section 73.1635 contains no such standard for granting an STA. Compare 47 C.F.R. § 73.1635(a)(2) (requiring that applicants in the broadcast services specify the “necessity for the requested STA”) with 47 C.F.R. § 25.120(b)(1) (“The Commission may grant a temporary authorization [in the satellite service] only upon a finding that there are *extraordinary circumstances* requiring temporary operations in the public interest . . .”) (emphasis added). If the Commission intended the language in a footnote of the *Order on Reconsideration* to change the policy for granting STAs to Class A stations, it failed to provide proper notice. See *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1362 (D.C. Cir. 1993) (reversing a Commission decision regarding the timely filing of applications which was based on one footnote in the order); see also *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 630 (D.C. Cir. 2000) (finding that a license applicant did not have fair warning that a non-profit station with minorities constituting the majority of its board was not minority controlled when notice was only provided in a footnote reference to a policy statement).

¹⁵ See *Media Bureau Announces Procedures to Assist Television and Radio Broadcast Stations in Areas Impacted by California Wildfires*, Public Notice, 24 FCC Rcd. 11320 (MB 2009).

when they were not broadcasting, including post-acquisition and during the buildout of the microwave facilities, and after the California wildfires. Specifically:

- **KASC-CA.** Station KASC-CA went silent on December 4, 2006, pursuant to which Una Vez Mas timely applied for and the Commission granted an STA.¹⁶ The station resumed operations on November 16, 2007. On November 12, 2008, as a result of the California wildfires, Una Vez Mas again took station KASC-CA silent, pursuant to which it applied for and the Commission granted an STA.¹⁷ Una Vez Mas subsequently applied for four additional STAs to renew or re-establish the silent status of KASC-CA.¹⁸
- **KLDF-CA.** Station KLDF-CA went silent on August 1, 2006, pursuant to which Una Vez Mas timely applied for and the Commission granted an STA.¹⁹ The station resumed operations on January 10, 2007. On November 13, 2008, as a result of the California wildfires, Una Vez Mas again took station KLDF-CA silent, pursuant to which it applied for and the Commission granted an STA.²⁰ Una Vez Mas subsequently applied for four additional STAs to renew or re-establish the silent status of KLDF-CA.²¹

¹⁶ See *Show Cause Order* at 2; FCC File Nos. BLSTA-20061204AGL and BLESTA-20070604ACP.

¹⁷ See *Show Cause Order* at 3; FCC File No. BLSTA-20081114AAV.

¹⁸ See FCC File Nos. BLESTA-20090427ACS, BLSTA-20091103ACX, BLESTA-20100421ACA, BLSTA-20110128ADU. The Commission granted the first two of these STA applications before the Video Division adopted an unofficial policy in 2009 not to dispose of STA requests.

¹⁹ See *Show Cause Order* and 2; FCC File No. BLSTA-20060817ABN.

²⁰ See *Show Cause Order* at 3; FCC File No. BLSTA-20081114AAQ.

²¹ See FCC File Nos. BLESTA-20090427ACU, BLSTA-20091103ACY, BLESTA-20100422AAP, BLSTA-20110128ADY. The Commission granted the first two of these STA applications before the Video Division adopted an unofficial policy in 2009 not to dispose of STA requests.

- **KDFS-CA.** As a result of the California wildfires, station KDFS-CA went silent on November 13, 2008, pursuant to which Una Vez Mas timely applied for and the Commission granted an STA.²² Una Vez Mas subsequently applied for four additional STAs to renew or re-establish the silent status of KDFS-CA.²³
- **KPAO-CA.** As a result of the California wildfires, station KPAO-CA went silent on November 12, 2008, pursuant to which Una Vez Mas timely applied for and the Commission granted an STA.²⁴ Una Vez Mas subsequently applied for four additional STAs to renew or re-establish the silent status of KPAO-CA.²⁵
- **KSBO-CA.** As a result of the California wildfires, station KSBO-CA went silent on November 12, 2008, pursuant to which Una Vez Mas timely applied for and the Commission granted an STA.²⁶ Una Vez Mas subsequently applied for four additional STAs to renew or re-establish the silent status of KSBO-CA.²⁷

²² See *Show Cause Order* at 3; FCC File No. BLSTA-20081114AAY.

²³ See FCC File Nos. BLESTA-20090427ACV, BLSTA-20091103ADC, BLESTA-20100422AAS, BLSTA-20110128ADS. The Commission granted the first two of these STA applications before the Video Division adopted an unofficial policy in 2009 not to dispose of STA requests.

²⁴ See *Show Cause Order* at 3; FCC File No. BLSTA-20081114AAT.

²⁵ See FCC File Nos. BLESTA-20090427ACW, BLSTA-20091103ADA, BLESTA-20100421ACB, BLSTA-20110128ADX. The Commission granted the first two of these STA applications before the Video Division adopted an unofficial policy in 2009 not to dispose of STA requests.

²⁶ See *Show Cause Order* at 3; FCC File No. BLSTA-20081114AAS.

²⁷ See FCC File Nos. BLESTA-20090427ACT, BLSTA-20091103ADB, BLESTA-20100421ACD, BLSTA-20110128ADP. The Commission granted the first two of these STA applications before the Video Division adopted an unofficial policy in 2009 not to dispose of STA requests.

Importantly, as stated above, each of the Stations resumed full-time operations between January 18 and 19, 2012—almost two months before the Commission released the *Show Cause Order*.²⁸

The Commission cannot and does not contend that the Stations failed to properly notify the agency and request a silent STA, nor that that the Commission declined to grant such authority. Rather, the Commission abruptly and inexplicably changes course and contends that Una Vez Mas “should have notified the Commission of [the Stations’] inability to meet the ongoing Class A eligibility requirements and requested a change in [the] stations’ status from Class A to low-power.”²⁹ Thus, it appears to be the agency’s view that Una Vez Mas was still subject to “the ongoing Class A eligibility requirements” while the Stations were silent and despite (i) timely notifications of silent status; (ii) timely requests for silent STAs for each station; (iii) compliance with the announced policy of the Commission following the California wildfires; and (iv) the Commission’s grant of the STA applications.³⁰ This stance ignores the fact that by the terms of the Commission’s own rules, the STAs provided Una Vez Mas with authority to operate the Stations “at variance from the terms of the . . . requirements of the FCC rules applicable

²⁸ See *Show Cause Order* at 3. The Commission’s assertion that the Stations’ inability to broadcast “was due to the Licensees’ business decisions to cease operations for financial reasons and not to timely resolve unidentified technical difficulties” is not borne out by the facts. The Stations required significant technical work post-acquisition, and subsequently were again forced off the air due to the California wildfires. Their ability to resume operations was further hampered by the unprecedented economic climate.

²⁹ See *id.*

³⁰ The Commission’s letters granting the STAs expressly recognized that each was a “request for Special Temporary Authority” for a “Class A Television” “to remain silent.” See, e.g., Letter from Hossein Hashemzadeh, Associate Chief, Video Division to Una Vez Mas Paso Robles License, LLC (Nov. 10, 2009). The letters specifically note the two rules that continue to apply while stations remain under silent authorization: (1) filing of renewal applications and (2) proper maintenance of tower illumination. Ongoing compliance with these rules is appropriate, as they do not depend on the stations actually being on the air.

to the particular class of station.”³¹ On its face, moreover, the Commission’s standpoint is internally inconsistent. It is inconceivable that the Stations would have been required to program for 18 hours per day with 3 hours of local programming per week *when, consistent with the rules and with the Commission’s approval, they were not broadcasting at all.*

Under these circumstances, the unjustly severe penalty proposed in the *Show Cause Order*—removing the Stations’ permanent Class A status—is indefensible. As reclassified LPTV stations, the Stations would have no protection when the Commission repacks the broadcast spectrum. Thus, contrary to the agency’s prior contention that “Class A licensees will not be subject to loss of license for failure to” meet the ongoing Class A programming requirements,³² reclassification will likely amount to a loss of license for some, if not all, of the Stations.³³ Short of denial of license renewal—a rare occurrence requiring a finding of a serious pattern of abuse—this penalty exceeds any imposed upon full-power stations or any other broadcast licensee, for that matter.³⁴

³¹ 47 C.F.R. § 73.1635(a).

³² See *Establishment of a Class A Television Service*, Order on Reconsideration, 16 FCC Rcd 8244, ¶ 34 (2001) (“*Order on Reconsideration*”).

³³ See Jonathan Make, *Media Bureau Keeps LPTV In Mind As It Seeks Repacking*, Communications Daily, Sept. 27, 2011 (“[FCC] [s]taffers said not all LPTV stations may be able to stay on-air after repacking.”).

³⁴ The Commission has described license revocation proceedings as “an extraordinary sanction” warranted only by “egregious” misconduct, see *C&W Communications*, Order, 20 FCC Rcd 5586, ¶ 9 (2005), and the conduct of Una Vez Mas with respect to the Stations cannot reasonably be likened to instances in which the Commission has resorted to license revocation proceedings. Cf. *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 26 FCC Rcd 6520 (2011) (initiating a license revocation hearing based on the licensee’s repeated misrepresentations to the FCC and violation of designated entity rules); *Contemporary Media, Inc.*, 13 FCC Rcd. 14437, ¶ 1 (affirming revocation of licenses for “violations of law relating to repeated sexual abuse of children by the stations’ sole owner and misrepresentations by the Licensees”).

In proposing to effectively revoke the license of the Stations for going silent, the Commission is singling out Class A stations for differential treatment. The Commission's STA rule is not service specific. The rule, which falls under "Subpart H – Rules Applicable to All Broadcast Stations," permits *any* station to request special temporary authority. In practice, however, the actions proposed in the *Show Cause Order* would at best create two different silent STA rules—one for Class A television stations and one for everyone else. At worst, in view of the projected outcome, they would deny the option of going silent to Class A stations entirely. Moreover, when a full-power station goes silent, the Commission's policy "favor[s] the resumption of broadcast operations."³⁵ Yet, in the present situation, despite the fact that the Stations resumed broadcast operations almost two months before the issuance of the *Show Cause Order*, the Commission responded by placing the Stations' continued viability in doubt by proposing to revoke their Class A status.³⁶ This is the type of differential treatment, without valid justification, for which courts have previously chastised the agency.³⁷

³⁵ See *Birach Broadcasting Corp.*, 16 FCC Rcd. 5015 ¶ 13 (2001).

³⁶ In the full power context, there are numerous examples of stations silent for extended periods that remain silent today or have returned to the air without incident and certainly without threat of loss of license or a reclassification that carries the substantial risk of loss of economic viability. Station WKQX(FM), Watseka, IL (Fac. ID 164237) has been off the air for all but three days of the last four years. Station WBHA(AM), Wabasha, MN (Fac. ID 54624), which was recently approved for sale, was dark for all but three days in the three and a half years prior to the sale. Similarly, station WASG(AM) was silent virtually continuously for the four years prior to its sale in 2011. Full power television station KCFG, Flagstaff, AZ (Fac. ID 35104) has operated for less than one month in the last two and a half years. Full power television station WFXU, Live Oak, FL (Fac. ID 22245) has been silent for 36 months during the last five years. Notably, stations WKQX and WBHA cited financial hardship as the reason for their continued silence.

³⁷ See *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965); *Communs. & Control, Inc. v. FCC*, 374 F.3d 1329, 1336 (D.C. Cir. 2004) (FCC must explain why it demands strict adherence from some licensees, but not all).

Additionally, the Commission provided no advance notice to Una Vez Mas and similarly situated licensees that adherence to the STA procedures would produce such dire consequences. Imposing such a heavy-handed penalty without providing reasonable notice to affected parties violates fundamental notions of due process. As the agency has recognized, “Fairness demands explicit notice for a severe sanction”³⁸ There is clear tension between the Commission’s rule permitting stations to go silent, in order that they may operate at variance “from . . . the rules applicable to the particular class or station” and its assertion that Section 73.6001 requires adherence to the Class A eligibility *and program service* requirements at all times, even when a station is not operating and under an STA.

Una Vez Mas’ actions were entirely reasonable given Commission precedent. In the twelve years since the Commission adopted the Class A rules, to the best of Una Vez Mas’ knowledge, the agency has *never* reclassified a station solely because the station was silent and was therefore unable to comply with the minimum programming requirements. As a result, Class A licensees have reasonably relied on the assumption that a station that was silent pursuant to an STA was *not* subject to reclassification for failing to comply with Section 73.6001.³⁹ Where, as here, notice of the Commission’s

³⁸ *Rev. Robert Owens, Philos Broadcasting Company, Inc.*, 21 FCC Rcd. 7977 (2006); *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) (“an agency may not . . . depart from a prior policy *sub silentio*”) (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)).

³⁹ The extent and scope of this confusion is evidenced by the fact that, in addition to the five Class A stations referenced in the instant *Show Cause Order*, there are at least 24 other stations to which the Commission has issued similar show cause orders for failing to comply with Section 73.6001 while they were under Silent STA. See *Reclassification of License of Class A Television Station KVTF-CA Brownsville, Texas*, Order to Show Cause, DA 12-530 (Apr. 3, 2012); *Reclassification of License of Class A Television Station WZGS-CA, Raleigh, North Carolina*, Order to Show Cause, DA 12-484 (Mar. 29, 2012); *Reclassification of License of Class A Television Station WHDO-CA, Orlando, Florida*, Order to Show Cause, DA 12-483 (Mar. 29, 2012); *Reclassification of License of Class A Television Station KXLK-CA Austin, Texas*, Order to Show Cause, DA 12-439 (Mar. 23, 2012); *Reclassification of License of Class*

expectations is demonstrably deficient and the proposed sanction is as severe as reclassification (raising, as it does, the specter of ultimate annihilation), “elementary fairness” demands that the Commission adopt a softer, reasoned approach.⁴⁰

IV. THE PROPOSED RECLASSIFICATION IS INCONSISTENT WITH THE COMMUNITY BROADCASTERS PROTECTION ACT’S PURPOSE AND THE COMMISSION’S COMMITMENT TO DIVERSITY AND LOCALISM.

It would contravene both the purposes of the CBPA and the Commission’s own diversity and localism objectives to undermine Una Vez Mas’ continued ability to provide Spanish-language programming to underserved Latino communities by reclassifying the Stations. In the *Class A Establishment Order*, the Commission stated that many LPTV stations eligible for Class A status “often provide ‘niche’ programming to residents of specific ethnic, racial, and interests communities.”⁴¹ Further, in the *Order* implementing the CBPA, the Commission recognized that providing additional protection to certain stations would advance the agency’s “fundamental goals of ensuring diversity and localism in television broadcasting.”⁴²

A Television Station KXCC-CA Corpus Christi, Texas, Order to Show Cause, DA 12-431 (Mar. 21, 2012); *Reclassification of License of Class A Television Stations KTJA-CA Victoria, Texas*, Order to Show Cause, DA 12-427 (Mar. 20, 2012); *Reclassification of License of Class A Television Station WGSA-CA Savannah, Georgia*, Order to Show Cause, DA 12-398 (Mar. 14, 2012); *Reclassification of License of Class A Television Station WJJN-LP Dothan, Alabama*, Order to Show Cause, DA 12-399 (Mar. 14, 2012); *Reclassification of License of Class A Television Station KPAL-LP Palmdale, California*, Order to Show Cause, DA 12-386 (Mar. 12, 2012); *Reclassification of License of Thirteen Class A Television Stations Licensed to L4 Media Group, LLC*, Order to Show Cause, DA 12-384 (Mar. 12, 2012); *Reclassification of License of Class A Television Stations WKOGLP Indianapolis, Indiana WKGK-LP Kokomo, Indiana*, Order to Show Cause, DA 12-383 (Mar. 12, 2012).

⁴⁰ *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985). Notably, the Commission will appropriately grant a waiver where its notice was insufficient due to confusion over ambiguous rules. See *American Family Association*, 19 FCC Rcd. 18681 (2004).

⁴¹ *Establishment of a Class A Television Service*, 15 FCC Rcd 6355, ¶ 1 (2000).

⁴² *Id.*

Preserving the Stations' Class A status is consistent with these policy goals and objectives. Since it acquired the Stations, as evidenced by its considerable upfront investment, Una Vez Mas has had every intention of bringing Azteca America's unique programming to Hispanic viewers along California's Central Coast. Unhappily, the destruction inflicted by the California wildfires and the unprecedented economic environment of the past several years have been, until recently, virtually insurmountable obstacles to Una Vez Mas' launch of Spanish-language programming—both locally produced programming and Azteca America network programming—to the large Hispanic population in the Santa Barbara-Santa Maria-San Luis Obispo DMA. Now, Una Vez Mas brings to the market Azteca America's nightly national newscast and plans to launch a local half hour newscast on the Stations in January 2013. Moreover, the Stations are carrying local health council and board of supervisors meetings.

The promise that Class A stations will uniquely further the Commission's diversity and localism objectives⁴³ by affording unserved communities increased, targeted television programming offerings is even more critically important now than it was when envisioned by Congress twelve years ago.⁴⁴ For example, the niche audience served by Azteca America affiliates has boomed since the rules' inception, with the United States Hispanic population growing from 32.8 million in 2000 to 48.9 million in

⁴³ See, e.g., *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 26 FCC Rcd 11464, ¶ 1 (2011) (“Our challenge in this proceeding is to . . . ensur[e] that our media ownership rules continue to serve our public interest goals of competition, localism, and diversity.”).

⁴⁴ See, e.g., *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (reforming the Universal Service Fund and intercarrier compensation mechanism to facilitate broadband access to unserved Americans).

2010.⁴⁵ Moreover, a disproportionately large segment of Spanish language speakers living in the United States rely exclusively on over-the-air television for video service compared to the general population.⁴⁶ It would be a disservice to this burgeoning, underserved segment of the U.S. population to eliminate an important source of programming in these markets just as Una Vez Mas has regained the necessary stability to fulfill the initial visions of Congress and the Commission for Class A television stations.

Regardless, the Commission has effectively sentenced the Stations, and Una Vez Mas' plans for the DMA, to death. Any change to the Stations' Class A status would at the very least shrink available capital, foreclose any prospect of a return on investment, and potentially shut down the Stations, depriving Hispanic audiences, whose viewing choices are particularly limited, from an alternative programming source, contrary to the Commission's goal of "provid[ing] stability and a brighter future to . . . stations that provide valuable local programming services in their communities."⁴⁷

⁴⁵ Census.gov, Melissa Therrien and Roberto R. Ramirez, *The Hispanic Population in the United States* (Mar. 2000), available at <http://www.census.gov/population/www/socdemo/hispanic/ho00.html>; Census.gov, *The Hispanic Population in the United States: 2010 Detailed Tables* (Mar. 2010), available at <http://www.census.gov/population/www/socdemo/hispanic/cps2010.html>.

⁴⁶ *OTA TV Homes Include 46 Million Consumers*, TVNewsCheck.com (June 6, 2011) ("[S]ome minority groups are more dependent on broadcast reception than the general population, including . . . 23% of Hispanic homes . . . , a proportion that increases to 27% among homes in which Spanish is the language of choice."), available at <http://www.tvnewscheck.com/article/2011/06/06/51686/ota-tv-homes-include-46-million-consumers>; see also *Digital Broadcast Television Transition Estimated Cost of Supporting Set-Top Boxes to Help Advance the DTV Transition*, U.S. Government Accountability Office, GAO-05-258T, at 4 (Feb. 17, 2005) ("Additionally, non-white and Hispanic households are more likely to rely on over-the-air television than are white and non-Hispanic households."), available at <http://www.gao.gov/new.items/d05258t.pdf>.

⁴⁷ *Id.*, ¶ 123.

V. THE COMMISSION'S INTERPRETATION OF THE "ONGOING CLASS A ELIGIBILITY REQUIREMENTS" CONTRADICTS THE UNAMBIGUOUS INTENT OF CONGRESS IN THE COMMUNITY BROADCASTERS PROTECTION ACT.

The underpinnings for the reclassifications proposed in the *Show Cause Order* are legally without merit because they rely exclusively on Section 73.6001(b) of the Commission's rules, which originates from an invalid exercise of agency power. Undeniably, the so-called "ongoing Class A eligibility requirements" exceed any programming requirements governing full-power television stations. As such, they run directly counter to the clear intent of Congress that Class A licenses shall remain *permanent* as long as the licensee remains in compliance with the applicable rules for full-power stations. Congress expected that certain rules applicable to full-power stations would not apply to Class A stations (for example, by virtue of the latter's reduced power). At the same time, Congress did not intend that there would be *additional* rules, beyond those applicable to full-power stations, that would apply to Class A stations. In particular, it is disingenuous to suggest that Congress intended to subject Class A stations to even more stringent operating requirements than imposed on full-power television stations, given Congress' express recognition of the fragility of the market that spawned them and the clear applicability of the 12-month statutory limit on silence to *all* broadcast licensees.

In adopting rules and regulations, the Commission is limited to the powers granted to it by Congress.⁴⁸ Where the plain meaning of a statute "directly address[es] the precise question at issue," the agency and reviewing courts "must give effect to the

⁴⁸ See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

unambiguously expressed intent of Congress.”⁴⁹ Where the “intent of Congress is clear, that is the end of the matter.”⁵⁰ A statute is ambiguous when “the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute’s specific terms.”⁵¹ Put another way, a statute “foreclose[s] the agency’s statutory interpretation” when it “prescrib[es] a precise course of conduct other than the one chosen by the agency”⁵²

The Community Broadcasters Protection Act of 1999, as codified at 47 U.S.C. § 336(f), prescribes a precise course of conduct for the Commission, providing no discretion for the agency to impose requirements upon Class A stations beyond those provided in the statute. First, the statute establishes narrow boundaries for the Commission’s implementing rules. Specifically, it provides that:

(i) the licensee shall be subject to the same license terms and renewal standards as the licenses for full-power television stations . . . ;
and

(ii) each such class A licensee shall be accorded primary status as a television broadcaster *as long as the station continues to meet the requirements for a qualifying low-power station*⁵³

With respect to the “requirements for a qualifying low-power station,” the statute also enumerates specific requirements:

a station is a qualifying low-power television station if –
(i) during the 90 days preceding November 29, 1999--

⁴⁹ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

⁵⁰ *Id.*; see also *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (holding that if the statute is not ambiguous, “we stop the music at step one”).

⁵¹ *United States v. Haggard Apparel Co.*, 526 U.S. 380, 393 (1999).

⁵² *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) (internal citations and quotations omitted).

⁵³ 47 U.S.C. § 336(f)(1)(A) (emphasis added).

- (I) such station broadcast a minimum of 18 hours per day;
 - (II) such station broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station . . . ; and
 - (III) such station was in compliance with the Commission's requirements applicable to low-power television stations; and
- (ii) from and after the date of its application for a class A license, the station is in compliance with the Commission's operating rules for full power television stations⁵⁴

Taking these provisions together, Congress established a two-step eligibility requirement for Class A stations. First, from August 31, 1999 through November 29, 1999, a station must have broadcast a minimum of 18 hours per day, including an average of 3 hours per week of programming produced within the station's market area, and complied with all applicable LPTV requirements. Then, from the date of its application, the station must comply with all applicable rules for full-power television stations. The Commission has recognized this two-step requirement both in the *Order* implementing the CBPA and in its *Order on Reconsideration*.⁵⁵

This interpretation of the plain text of the statute is consistent with Congress' intent to create "a *permanent* Class A license for qualifying low-power stations."⁵⁶ At the time of the CBPA's passage, the more than 2,000 licensed and operational LPTV stations faced an uncertain future as the result of the issuance of companion digital

⁵⁴ 47 U.S.C. § 336(f)(2). While the statute permits the Commission to expand the definition of a qualifying low-power television station if it determines that such a designation would serve the public interest, convenience, and necessity, *see* 47 U.S.C. § 336(f)(2)(B), there is no provision by which the Commission can adopt a narrower definition of a qualifying low-power television station.

⁵⁵ *See Class A Television Service*, Report and Order, 15 FCC Rcd. 6355 ¶ 15 (2000) ("*Class A Order*"); *Establishment of a Class A Television Service*, Order on Reconsideration, 16 FCC Rcd. 8244 ¶ 25 (2001) ("*Order on Reconsideration*") ("To qualify for Class A status, the CBPA provides that, during the 90 days preceding enactment of the statute, a station must have been in compliance with the Commission's requirements for LPTV stations. In addition, beginning on the date of its application for a Class A license and thereafter, a station must be 'in compliance with the Commission's operating rules for full-power stations.'").

⁵⁶ Report of the Committee on Commerce, Science, and Transportation, S. Rep. 105-411 I (1998).

channels to every analog station to facilitate the digital transition. This doubling of the number of allocated television channels threatened to displace many LPTV stations.⁵⁷ Congress recognized that the resulting uncertainty made it difficult, if not impossible, for LPTV stations to obtain access to much-needed capital.⁵⁸ Accordingly, Congress sought, through the CBPA, to provide “regulatory certainty” to the stations and their investors by subjecting their licenses to the same license terms and renewal standards as full-power stations.⁵⁹

Congress was unable, however, to provide permanent status to *all* LPTV stations because of the scarcity of channels, which would be compounded by the addition of companion digital channels.⁶⁰ Accordingly, Congress established the criteria described above to qualify those LPTV stations that it determined were most worthy of receiving the full protections accorded to full-power television stations. Congress anticipated and intended that these criteria would limit the number of LPTV stations eligible for permanent Class A licenses to between 200 and 400 stations.⁶¹ Once these stations were selected, however, Congress intended that they would “assume the same duties and responsibilities as their full-power counterparts.”⁶²

⁵⁷ Section-by-Section Analysis to S. 1948, the Act known as the “Intellectual Property and Communications Omnibus Reform Act of 1999,” as printed in the Congressional Record of November 17, 1999 at pages S 14707-14726 (“Section-by-Section Analysis”), at S 14724-14725.

⁵⁸ *Id.* at 14725.

⁵⁹ *Id.*

⁶⁰ Report of the Committee on Commerce, H. Rep. 106-384, at 6 (Oct. 14, 1999) (“The Committee recognizes that, because of emerging DTV service, not all LPTV stations can be guaranteed a certain future.”).

⁶¹ Report of the Committee on Commerce, Science, and Transportation, S. Rep. 105-411, at 2 (Oct. 12, 1998).

⁶² *Id.*

Despite the clear language of the statute and the express Congressional intent that the programming requirement only serve as an initial screen for Class A eligibility, the Commission adopted it as an “ongoing” requirement for Class A stations. In so doing, the agency wrongly stated that the CBPA “requires that Class A licensees continue to meet the eligibility criteria established for a qualifying low-power station in order to retain Class A status.”⁶³ In fact, the statute demands that Class A stations continue to meet the “requirements” for a Class A station, not the “eligibility criteria.”⁶⁴ Once a Class A station filed its application, its ongoing “requirements” are the applicable rules for full-power television stations.⁶⁵ As demonstrated above, Una Vez Mas’ actions with respect to the Stations were entirely consistent with the applicable rules for full-power stations, whose licenses would not be in jeopardy for failure to remain on the air unless such failure extended beyond twelve consecutive months, as clearly established by Congress.⁶⁶

⁶³ *Class A Order* at ¶ 30.

⁶⁴ *See* 47 U.S.C. § 336(f)(1)(A)(ii).

⁶⁵ 47 U.S.C. § 336(f)(2)(A). The Commission’s prior dismissal of this common-sense reading of the statute cannot withstand scrutiny. In response to a Petition for Reconsideration filed by Univision, the Commission offered two justifications for its “ongoing Class A eligibility requirements”: *first*, that under the CBPA, licensees must “‘continue’ to meet the qualifying low-power station eligibility criteria” and, *second*, that relieving stations of the local programming requirements “would be inconsistent with the overall intent of the CBPA.” As explained above, the CBPA clearly defined the ongoing obligations of Class A stations as “the Commission’s operating rules for full-power stations.” This is consistent with Congress’ intent not to create a special class of stations with additional burdens and fewer benefits than full-power stations, but rather to establish an initial limiting mechanism for stations that would receive most of the benefits and all of the relevant obligations of their full-power brethren. Certainly, consistent with the rules imposed on full-power television stations, whether or not a Class A television station is serving the public interest may appropriately be considered through the license renewal process. But because the Commission’s ongoing programming requirement for Class A stations exceeds those “duties and responsibilities” applicable to full-power stations, they are invalid as a matter of law and unenforceable under the present circumstances.

⁶⁶ *See* 47 U.S.C. § 312(g).

To the extent the Commission's intent in issuing the *Show Cause Order* is to use the letter of Section 73.6001(b) to weed out "bad actors" that have no intent of utilizing the spectrum licensed to them for its intended purpose, its actions are misguided in the case of the Stations. As demonstrated herein, Una Vez Mas was and is a committed broadcaster, and it did what it reasonably believed it, as a Commission licensee, was required and permitted to do to preserve its licenses in the face of calamitous circumstances. It has since returned the Stations to full time operation, and the Stations are operating in compliance the rules governing full-power television stations, including those embodied in Section 73.6001(b). Nonetheless, should the Commission determine that the "continuing eligibility" requirements of the rule apply, Una Vez Mas alternatively requests a waiver of those rules based upon the facts presented herein and its reasonable belief that it was acting in concert with established Commission precedent.

VI. CONCLUSION

For the foregoing reasons, Una Vez Mas respectfully requests that the Commission preserve the Stations' Class A licenses and, if necessary, grant a retroactive waiver of Section 73.6001 of the Commission's rules.

Respectfully Submitted,

UNA VEZ MAS, LP

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April 23, 2012

DECLARATION OF TERENCE CROSBY

Terence Crosby hereby declares under penalty of perjury that:

1. I am Chief Executive Officer of Una Vez Mas, LP.
2. I have read the Order to Show Cause directed to Una Vez Mas, LP's affiliated licensees that was released by the Federal Communications Commission on March 15, 2012.
3. I have read the foregoing Response to Order to Show Cause.
4. The facts as stated in the Response to Order to Show Cause are true and Correct.

Executed this 23rd day of April, 2012.


Terence Crosby